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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals sanctioned an extreme departure from the accepted and usual course of judicial proceedings when it affirmed the District Court's refusal to strike that portion of a lay witness' testimony in which she testified as to her belief that Perez was a drug dealer, when she admitted that such opinion was based solely on supposition and conjecture.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlos Perez ("Perez") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 31, 2007.

OPINIONS BELOW

The unpublished, opinion, Order and Mandate of the United States Court of Appeals for the Third Circuit that gives rise to this petition is reprinted in Appendix at page 1. The Judgment entered against Perez by the United States District Court for the Eastern District of Pennsylvania is reprinted in Appendix at page 20.

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over the trial of this matter pursuant to 18 U.S.C.A. § 3231. Perez was convicted and sentenced. Exercising appellate jurisdiction under 28 U.S.C. §§ 41 and 1291, the Third Circuit affirmed Perez' conviction and sentence by Order dated July 31, 2007. Perez' present petition is timely-filed under Supreme Court Rule 13.1 since it was filed within 90 days of the Third Circuit's entry of Judgment.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This petition seeks review of a decision of the United State Court of Appeals for the Third Circuit sanctioning the District Court's allowance of a lay witness to provide rank speculation and unsupported opinion testimony with respect to her belief that Perez was a drug dealer.

This matter was captioned in the District Court as *United States v. Carlos Perez*, 03-CR-554-01. On August 28, 2003, a Federal Grand Jury sitting in the Eastern District of Pennsylvania issued indictment number 03-554 against Carlos M. Perez charging that he possessed drugs with the intent to distribute them in violation of 21 U.S.C. § 841 (Counts 1, 2 and 3) and that he possessed a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) (Count 4).

On June 10, 2004 Appellant was arraigned by Judge Carol Sandra Moore Wells at which time Appellant entered a plea of not guilty to all counts of the Indictment.

A jury was empanelled on June 15, 2005 and trial was commenced. On June 20, 2005 the jury advised the Trial Judge that it was unable to reach a

unanimous d[illegible]ion and on that same date the Trial Judge declared a Mistrial.

Another jury was empanelled on October 25, 2005 and trial commenced for a second time. On October 27, 2005, the jury returned a verdict finding Appellant guilty of all charges on the Indictment.

On February 17, 2006 the Trial Judge sentenced Appellant to 252 months and five years supervised release. The Judgment was entered on the docket on March 3, 2006, and Appellant filed a timely Notice of Appeal of his conviction with the United States Court of Appeals for the Third Circuit and on July 31, 2007 the court, in an unpublished opinion, affirmed the conviction and sentence.

Background

At approximately 5:30 am on Thursday, April 24, 2003 Philadelphia Police officers Joseph Motto, Ronald Dove and Detective Thadius Wolkowitz, with the assistance of a SWAT entry team, traveled to and executed a search warrant at 9601 Ashton Road, Apartment H-13, in the Northeast section of Philadelphia, Pa. The object of the warrant was to seize sports shirts and guns, owned by Carlos Perez, which were believed to be in the apartment. The tenants identified on the apartment's lease were Ms. Bobbi Compton and Kim Mastrianni.

The SWAT team made an entry into the apartment, secured Ms. Compton and conducted a search. Upon concluding their search the officers asked Ms. Compton whether she and/or Mr. Perez

owned any cars which were parked in the parking lot of the apartment complex. Ms. Compton first replied that they did not. Upon further questioning she indicated that there was a Pontiac Grand Am in the parking lot that she and Mr. Perez owned.

The vehicle was searched and the drugs at issue were recovered.

Ms. Compton did not testify during the first trial. She did however testify during the second trial and such testimony apparently made the difference. More to the point, she testified that she and Mr. Perez were involved in a relationship at the time of his arrest and that they lived together at the Ashton Road address. The prosecution, over defense objections, asked Ms. Compton whether she believed that Mr. Perez was a drug dealer.

Ms. Compton testified as follows with respect to her belief that Mr. Perez sold drugs:

> Q. [By Mr. Wright] ...Did you ever hear Mr. Perez refer to work?
>
> A. [By Ms. Compton] Yes.
>
> Q. And in what context – the term, work – in what context did he—
>
> A. What did it mean, you mean?

Q. Yes, what did it mean to you?

A. It meant he was out selling drugs.

Q. And why do you say that?

A. Because that's what it meant.

Q. And how do you know that he was out selling drugs?

A. I don't know, it's the term.

She further testified as follows with regard to a prior statement she made:

Q. [By Mr. Santaguida] So even though you never saw Carlos with drugs, you told them, yes, because that's what they wanted to hear?

A. [By Ms. Compton] Yes.

Q. [By Mr. Santaguida] ...tell me what you know about Carlos' drug business?

> And you said: Not much. He mostly kept it to himself.
>
> ***
>
> Q. Do you remember making that—that – making that answer?
>
> A. Yes.
>
> ***
>
> Q. So, you never saw him with any cocaine?
>
> A. No, I never saw him with that.

The Third Circuit Opinion

On appeal, the Third Circuit affirmed Perez' conviction and sentence. The Court found that since Ms. Compton's testimony was based on her direct observations and perceptions of Perez's behavior which consisted only of Perez providing marijuana to her, overhearing conversations between Perez and others during which Perez referred to numbers, and Perez's use of the word "work".

Because the Third Circuit's ill-based decision sanctioned the District Court's departure from the accepted and usual course of judicial proceedings, this Court must exercise its supervisory powers.

REASONS FOR GRANTING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE LOWER COURT AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION

The proceedings below departed from the usual and accepted course of Judicial Proceedings in several respects however, Perez has chosen to bring only one of those instances to this court's attention.

A substantial departure occurred when the trial court failed to preclude testimony from Perez' girlfriend, Bobbi Compton, who testified that she believed that he was a drug dealer. In determining whether Compton's opinion testimony was properly admitted by the district court, the Third Circuit should have determined the scope of Federal Rule of Evidence 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

FED.R.EVID. 701.

The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. *See* Mason Ladd, *Expert Testimony,*5 VAND.L.REV. 414, 417 (1952).

Compton did not possess such information with respect to Perez' alleged drug dealing activities. She never saw him with cocaine, never saw him engage in any transactions, and he never told her that he sold cocaine. She did not have first hand knowledge of any such activities. She merely speculated that he sold cocaine and the court incorrectly allowed her to do so. The District Court had a duty to prevent the Government from introducing this speculative evidence and its failure to do so denied Mr. Perez his right to Due Process and thus violated his Fifth Amendment right.

Perez raised this issue in his appeal to the Third Circuit. The rejected the argument finding that the testimony was reliable and helpful to the jury.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1694

UNITED STATES OF AMERICA

v.

CARLOS MANUEL PEREZ,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 03-cr-00554
District Judge: Hon. Juan R. Sanchez

Submitted Under Third Circuit LAR 34.1(a)

July 12, 2007

Before: SLOVITER, ALDISERT and ROTH, Circuit Judges.

(Filed: July 31, 2007)

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Carlos Perez appeals from his conviction of possession with intent to distribute crack, cocaine and marijuana in violation of 18 U.S.C. § 841(a)(1) and of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C.§ 924(c)(1). He contends that his conviction was flawed because of (1) alleged prosecutorial misconduct before the grand jury, (2) alleged error by the District Court in refusing to suppress guns and drugs found after his girlfriend consented to a search of a car they both drove, (3) alleged error by the District Court in allowing his girlfriend to testify that Perez was a drug dealer, and (4) alleged insufficiency of the evidence supporting his conviction of possession of a firearm in furtherance of a drug trafficking crime. We find Perez's arguments devoid of merit and accordingly will affirm his conviction.

I.

In the early morning of April 14, 2003, Allen Iverson, star of the Philadelphia 76ers basketball team, was in the vicinity of the Glam nightclub in Philadelphia when an assailant fired a gun in his direction. The gunfire struck Larry Robinson, one of Iverson's companions, who had been standing beside Iverson's Bentley automobile. The Philadelphia Police Department investigated the shooting and identified Carlos Perez as their prime suspect.

Ten days later--at approximately 5:30 a.m. on April 24, 2003--Philadelphia police officers assisted

by a SWAT entry team arrived at the apartment Perez shared with his fiancee, Bobbi Lynn Compton, located at 9601 Ashton Road in the Northeast section of Philadelphia. They had intended to arrest Perez and execute a warrant to search his residence. When the officers arrived, only Compton was present, but the search proceeded as planned. The officers advised Compton of the scope of the search warrant, which authorized them to seize "[a]ny handguns, ammunition, sports jerseys, proof of residency and any other items deemed to be of evidentiary value in this investigation." App. 72. Officers found a bulletproof vest in the bedroom shared by Perez and Compton.

The officers asked Compton whether she or Perez had any vehicles parked nearby, and she told them about a green 1995 Pontiac Grand Am that was parked in an adjacent lot. Compton explained that she was the registered owner of the Grand Am--the insurance was also in her name--but Perez had paid for it. The officers confirmed that Compton was the registered owner, and then asked her to consent to a search. She consented, and did not place any limitations on the scope of the search. She signed a consent form that one of the officers had drawn up, and gave the officers the keys.

During their search of the Grand Am, the officers found an unlocked duffel bag in the trunk. The duffel bag had a zipper which the recovering officer later recalled to have been at least partially open. The officers opened the bag and found inside approximately 39.5 grams of cocaine base ("crack"),

approximately 990 grams of cocaine, approximately 275.6 grams of marijuana, a loaded .38 caliber revolver with an obliterated serial number, a .22 caliber Beretta pistol, Perez's passport, and his Pennsylvania nondriver's identification card.

On May 29, 2003, Compton testified before the Grand Jury investigating Perez. The Assistant U.S. Attorney questioned Compton about Perez's connection to the shooting incident involving Iverson, and she testified that he had told her that he and a friend had argued with Iverson and his companions, and that he had fired several shots at Iverson's group. The Assistant U.S. Attorney also questioned Compton about Perez's involvement with the drug trade, and she testified that Perez sold cocaine and marijuana. She further testified that he carried guns regularly. The Grand Jury indicted Perez on four counts, charging him with (1) possession with intent to distribute cocaine base; (2) possession with intent to distribute cocaine; (3) possession with intent to distribute marijuana-each in violation of 18 U.S.C. § 841(a)(1); and (4) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).

Perez filed motions to quash the indictment and to suppress the physical evidence. In his motion to suppress, he acknowledged that he owned the duffel bag that was found in the Grand Am's trunk, but moved to suppress the drugs and handguns found within it. The District Court denied his motions on June 10, 2005.

Perez's trial began on June 15, 2005. The District Court declared a mistrial five days later after the jury failed to reach a unanimous decision, and Perez's retrial commenced on October 25, 2005. The District Court prevented the government from introducing evidence of Perez's connection to the Iverson shooting, and also evidence that he had fired shots at an unidentified person on June 28, 2002, finding that the evidence's potential for prejudicing the jury outweighed its probative value. The jury convicted Perez on all counts, and the District Court sentenced him to 252 months' imprisonment. Perez appeals his conviction.

II.

Perez first argues that the prosecutor committed misconduct before the grand jury by introducing evidence that Perez believes was prejudicial and lacking in foundation. Specifically, he contends that the prosecutor engaged in misconduct when he pursued "extensive questioning of witness Bobbi Compton about nothing more than a rumor that Mr. Perez was involved in an altercation with professional basketball player Allen Iverson in which Mr. Perez allegedly fired shots at Mr. Iverson and his associates," and also when the prosecutor elicited Compton's "admittedly unsubstantiated rank speculation that Mr. Perez was a drug dealer." Appellant's Br. 13. As a result of this alleged misconduct, Perez argues that the District Court should have dismissed his indictment.

When considering whether a District Court erred in failing to dismiss an indictment based on

alleged error at the grand jury stage, our standard of review depends on the form of error alleged. Where Appellant does not allege a structural error or fundamental unfairness in grand jury proceedings, our review is governed by the harmless error rule. Rule 52(a), Federal Rules of Criminal Procedure; see Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988). On the other hand, if fundamental error was committed at the grand jury stage-that is, if "the structural protections of the grand jury [were] so compromised as to render the proceedings fundamentally unfair," we apply a "presumption of prejudice." Bank of Nova Scotia, 487 U.S. at 257.

In this case, Perez does not assert fundamental error at the grand jury stage, and so we will apply the harmless error standard. Indeed, Perez acknowledges that harmless error review governs. Under the harmless error review standard, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Federal Rule of Criminal Procedure 52(a).

In making this concession, Perez gives up the game. Although he forges onward--arguing that grand jury error in the form of prosecutorial misconduct occurred, and that it was not harmless because it resulted in the introduction of evidence that was prejudicial to him--his effort is doomed from the start. He cannot surmount the strict manner in which the Supreme Court and this Court of Appeals have construed the harmless error standard as applied to alleged grand jury error.

In United States v. Mechanik, 475 U.S. 66, 69 (1986), the Supreme Court considered a claim that defendants had been prejudiced by "the simultaneous presence and testimony of . . . two Government witnesses before the grand jury," which the Supreme Court presumed to be a violation of Rule 6(d) of the Federal Rules of Criminal Procedure. The Supreme Court held that such error was rendered harmless by a subsequent finding of guilt by a petit jury. Id. at 70. As Justice Rehnquist put it in his majority opinion, "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." Id.

Perez might attempt to distinguish his claim from that in Mechanik; in Mechanik the defendants did not make a pre-trial motion to dismiss the indictment, id. at 68, and the majority did not cast the violation of Rule 6(d) as prosecutorial misconduct. But any hope Perez might have had of distinguishing Mechanik is extinguished by precedent of this Court. In United States v. Console, 13 F.3d 641, 671 (3d Cir. 1993), the district court denied a pretrial motion to dismiss an indictment on the basis of alleged prosecutorial misconduct before the grand jury. The district court denied the motion notwithstanding its finding that "the prosecutor asked improper questions which implied that the defendants were guilty and assumed the existence of ultimate facts within the grand jury's sole discretion," and "that the prosecutor engaged in 'numerous examples of impermissible testifying,

badgering and commenting on the veracity of witnesses and evidence."" Id. at 671 n.40 (quoting the district court). We affirmed the conviction, determining that "the petit jury's guilty verdict rendered any prosecutorial misconduct before the indicting grand jury harmless." Id. at 672 (citing Mechanik, 475 U.S. at 70-72).

The same is true in the case before us today. The prosecutorial behavior alleged by Perez falls far short of the misconduct found by the district court in Console. See id. at 671 n.40. Indeed, we seriously doubt that Perez has alleged anything that could qualify as error at the grand jury stage.[1] But, as in

---

[1] Perez not only fails to allege a violation of the Constitution, he also does not allege a violation of any Federal Rule of Criminal Procedure or of any statute or common-law rule governing grand juries. See United States v. Williams, 504 U.S. 36, 46 n.6 (listing rules that apply to grand jury proceedings). He does not even identify a specific ethical rule that he believes was violated-although it is far from clear we could consider such a violation to be cognizable error, given our limited supervisory powers over grand juries. See id. at 46-47. Perez alleges "prosecutorial misconduct" to have taken place, but whether we can recognize prosecutorial misconduct as a cognizable error in its own right when no underlying violation of a rule is alleged is doubtful; the malleability of the "prosecutorial misconduct" label may make it unsuitable to be considered an error in its own stead. See Williams, 504 U.S. at 54 (observing that "[a] complaint about the quality or adequacy of the evidence"-which cannot serve as the basis of dismissing a grand jury indictment-"can always be recast as a complaint that the prosecutor's presentation was `incomplete' or `misleading'"). If prosecutorial misconduct cannot in and of itself be considered an error in grand jury proceedings, then Perez's complaint can only be construed as a request for us to craft a new rule of grand jury procedure-a rule proscribing the introduction of overly

Mechanik, any error Perez might have identified is rendered harmless by his conviction beyond a reasonable doubt by the Petit Jury on October 27, 2005.

III.

Perez next alleges that the District Court improperly denied his motion to suppress physical evidence. He contends that the District Court should have suppressed the guns and drugs recovered from inside the duffel bag in the trunk of the Grand Am. He argues that his girlfriend's consent to the search of the vehicle was invalid, and also that it did not extend to the contents of the bag. As we stated in United States v. Perez, 280 F.3d 318, 336 (3d Cir. 2002), we "revie[w] the District Court's denial of a motion to suppress for clear error as to the underlying factual findings and exercis[e] plenary

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prejudicial or inadequately supported testimony before grand juries. Although we need not reach the matter in this case, we note that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id. at 50; see United States v. Gomez, 237 F.3d 238, 240, 241-242 (3d Cir. 2000) (holding that a court may not require a prosecutor to advise a defendant "that he could remain silent and that anything he said could be used against him"); Baylson v. Disciplinary Bd. of the Supreme Court of Pennsylvania, 975 F.2d 102, 104, 111 (3d Cir. 1992) (holding that district courts lack the authority to establish a local rule requiring "a federal prosecutor to obtain prior judicial approval before serving a grand jury subpoena on an attorney where the attorney would be asked to testify about past or present clients").

review of the District Court's application of the law to those facts."

A warrantless search, even if unsupported by probable cause, is proper if undertaken pursuant to valid consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Valid consent can come from "a third party who possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171 (1974). The government bears the burden of establishing that the third party had actual or apparent authority over the searched area. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

Perez gets nowhere with his argument that his girlfriend, Bobbi Compton, lacked actual and apparent authority to authorize a search of the Grand Am. Compton was the legal owner of the car and had the keys to it. Although Perez may have used the car more frequently than Compton did, Compton drove the car from time to time. By leaving his duffel bag inside the Grand Am, Perez assumed the risk that Compton would consent to a search of the car and its contents. See Matlock, 415 U.S. at 172 n.7; United States v. McCarthy, 77 F.3d 522, 535 (lst Cir. 1996); United States v. Beshore, 961 F.2d 1380, 1382 (8th Cir. 1992).

Perez's argument that the search of the contents of the zippered bag exceeded the scope of Compton's authorization is similarly unavailing. As the Supreme Court stated in Florida v. Jimeno, 500 U.S. 248, 251 (1991), "[t]he scope of a search is generally defined by its expressed object"--here, the

Grand Am. The party consenting to a search "may of course delimit as [she] chooses the scope of the search to which [she] consents. But if [her] consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization." Id. at 252.

When the law enforcement officers executed the search warrant of Perez and Compton's apartment, they explained to Compton the scope of the warrant. The warrant sought "[a]ny handguns, ammunition, sports jerseys, proof of residency and any other items deemed to be of evidentiary value in [the] investigation." App. 72. In the context of this wide-ranging search, Compton consented to the search of the Grand Am. Although she had the right to limit the scope of the search, she did not do so. We must determine whether her consent could reasonably be understood to extend to the bag in the trunk.

Two cases guide our analysis. In Florida v. Wells, 495 U.S. 1, 2, 4-5 (1990), the Supreme Court held that "a locked suitcase in the trunk" of a car was not properly opened as part of an inventory search. In contrast, the following year the Supreme Court held that a suspect's consent to search his car allowed law enforcement officers to open a "folded, brown paper bag on the floorboard" of the car's passenger side. Jimeno, 500 U.S. at 250, 251-252.

The facts of the case before us resemble those in Jimeno. The bag in the trunk of the Grand Am was unlocked and apparently was partially or

completely unzipped. It was easily opened with minimal intrusion, like the paper bag in Jimeno. It was capable of holding several if not all of the items for which Compton knew the officers were searching. The Supreme Court stated in Jimeno, id., that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." We find it inconsequential that the bag in the trunk of the Grand Am was made not of paper but of cloth. Jimeno controls, and we conclude that the officers did not go beyond the scope of the authorized search when they inspected the contents of the duffel bag.

IV.

Perez argues that, under Rule 701 of the Federal Rules of Evidence, the District Court should have excluded Compton's testimony that Perez was a drug dealer and possessed firearms. Perez objected to this testimony at trial based on Rule 404(b) of the Federal Rules of Evidence, relating to character evidence. He now argues under Rule 701 that the testimony was impermissible lay opinion testimony. As we observed in United States v. Williams, 464 F.3d 443, 445 (3d Cir. 2006), "[t]here is no evidence that [Appellant] objected on this basis at trial, and we therefore review the instructions for plain error." We will not find plain error here.

Rule 701, the basis of Perez's current objection, states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

As we noted in Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399,403 (3d Cir. 1980), "[a] lay witness in a federal court proceeding is permitted under [Federal Rule of Evidence 701] to offer an opinion on the basis of relevant historical or narrative facts that the witness perceived." Indeed, "[t]he modern trend favors the admission of opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination." Id.

In the case at bar, Perez maintains that Compton's testimony was improper because she had no evidence to support her statements that he was a drug dealer who possessed firearms. Perez contends that Compton "had neither first nor second hand knowledge that [he] sold drugs." Appellant's Br. 25. We disagree.

Compton stated that her testimony was based on her personal perceptions. Perez provided her with marijuana, which she smoked, and when he referred to his "work," she understood within the context of their relationship that he was referring to drug

dealing. App. 408. She also overheard Perez's conversations with others, who requested from Perez items identified by numbers, which she took to be drugs. The government inquired into these conversations:

> Q: And what was your understanding as to what those numbers-will you give us an example of that?
>
> A: People asking for numbers, like, four and halves, nines, it's talking about cocaine.

App. 409.

Compton's testimony was based on her direct observations and perceptions of Perez's behavior. It was helpful to the jury, and not based on technical or scientific knowledge. Accordingly, the District Court did not commit plain error by allowing Compton's testimony notwithstanding Rule 701's restrictions on lay opinion testimony.

V.

Finally, Perez argues that the evidence presented at trial was insufficient to support the jury's finding beyond a reasonable doubt that he possessed a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). As with any post-conviction challenge to the sufficiency of evidence, this one faces an uphill climb:

> We apply a particularly deferential standard of review when deciding whether a jury verdict rests on legally sufficient evidence. "It is not for us to weigh the evidence or to determine the credibility of the witnesses." Rather, we must view the evidence in the light most favorable to the government, and will sustain the verdict if "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Thus, "a claim of insufficiency of the evidence places a very heavy burden on an appellant."

United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1988) (citations omitted) (quoting United States v. Voigt, 89 F.3d 1050, 1080 (3d Cir. 1996); United States v. Thomas, 114 F.3d 403, 405 (3d Cir. 1997); United States v. Gonzalez, 918 F.2d 1129, 1132 (3d Cir. 1990)).

Both parties apparently agree that the relevant evidence consists of the two handguns and assorted illegal drugs found beside each other in a bag in the Grand Am's trunk. Perez argues that the proximity of the guns to the drugs was insufficient to support his conviction. He suggests that the government was required to show that he "used or carried" a firearm during and in relation to a drug trafficking offense or a crime of violence, and that the government failed to make this showing. Appellant's Br. 27. In his reply brief, he further argues that the government was required to show

that he "took some affirmative step to possess the gun to further his participation in a drug trafficking crime," and that the government failed to do so. Appellant's Reply Br. 5.

As an initial matter, we note that 18 U.S.C. § 942(c) does not require a showing that a defendant used or carried a firearm. The relevant part of the statute states that it applies generally to "any person who, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . ." 18 U.S.C. § 924(c)(1)(A) (emphasis added). This language makes clear that, while using or carrying a firearm may be grounds for conviction, possession in furtherance of a drug trafficking crime also may suffice.

Interpreting the possession prong of § 924(c), we have stated that "the evidence must demonstrate that possession of the firearm advanced or helped forward a drug trafficking crime." United States v. Sparrow, 371 F.3d 851, 853 (3d Cir. 2004). In determining whether this is so, we consider the following nonexclusive list of factors:

> 'the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found.'

Id. (quoting United States v. Ceballos-Torres, 218 F.3d 409, 414-415 (5th Cir. 2000)). Immediate accessibility of the weapon is not a requirement for a § 924(c) conviction. See id. at 854 (affirming a conviction under § 924(c) in a case in which law enforcement officers found a firearm hidden in a compartment underneath floor tiles along with nine bags of marijuana and $140 cash).

In this case, officers found two handguns in the trunk of a car Perez regularly drove, in his duffel bag, alongside a sizable quantity of marijuana, cocaine and crack. One of the two handguns was loaded and had an intentionally obliterated serial number. The facts are not unlike those in Sparrow, 371 F.3d at 853, in which "[t]he gun was placed so that it would be immediately available for Sparrow's protection whenever he retrieved drugs or money from the floor compartment." In that case, we found it "reasonable to assume the firearm was placed in the floor compartment for that purpose and was possessed in furtherance of Sparrow's drug activities." Id. Likewise in this case, we are satisfied that the evidence was sufficient for a rational trier of fact to conclude that Perez possessed a firearm in furtherance of a crime of violence or drug trafficking crime.

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The judgment of the District Court will be affirmed.

App. 18

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1694

UNITED STATES OF AMERICA

v.

CARLOS MANUEL PEREZ,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 03-cr-00554
District Judge: Hon. Juan R. Sanchez

Submitted Under Third Circuit LAR 34.1(a)

July 12, 2007

Before: SLOVITER, ALDISERT and ROTH, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on July 12, 2007.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district court entered February 22, 2006, be and the same is hereby AFFIRMED.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: July 31, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	: CRIMINAL : ACTION : 03-cr-554-01
v.	:
	:APPELLATE :ACTION
CARLOS MANUEL PEREZ	:06-1694

MEMORANDUM

Juan R. Sanchez, J. **March 9, 2006**

At his sentencing hearing, Defendant Carlos Manuel Perez ("Perez") argued for a reasonable sentence based on the sentencing disparity between crack cocaine and powder cocaine. I found a reasonable sentence need not reflect the sentencing disparity based on an individualized assessment of the facts of Perez's case. On February 22, 2006, Perez filed a timely notice of appeal to the Third Circuit from the judgment of sentence in the above captioned matter. The Court submits this memorandum opinion in accordance with Local Appellate Rule 3.1. Because I do not know what issues Perez will raise on appeal, I will discuss the issues raised by Perez at his sentencing hearing and address the reasonableness of his sentence in light of underlying legal standards and the facts of this case.

BACKGROUND[2]

In April 2003, Perez was a suspect in the attempted murder of two individuals. On April 24, 2003, the Philadelphia police officers executed a search warrant at the apartment Perez shared with his girlfriend, Bobbi Compton. Perez was incarcerated at the time of the search but Compton was present. During the search, Compton gave written consent for the officers to search two vehicles: a 2002 Mercedes-Benz CLK and a 1995 green Pontiac Grand Am, both of which were parked at the searched residence.[3] Nothing of evidentiary value was recovered from the Mercedes-Benz CLK. A search of the Pontiac Grand Am recovered a duffel bag in the trunk containing: (1) 39.5 grams of cocaine base ("crack"), (2) 990.5 grams of cocaine, (3)

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[2] The background facts were taken from the Pre-Sentence Investigation Report ("PSIR"), which was prepared by the United States Probation Office. The PSIR summarizes facts consistent with the evidence gathered by the government and presented at trial. Neither the Government nor Perez filed any written objections to the PSIR. At the sentencing hearing, defense counsel questioned one criminal history notation for a reckless conduct conviction. Perez did not deny the conviction; he merely clarified he was arrested only once for this charge. The Court fully adopted and credited the PSIR with few modifications as well as the factual findings and guideline application and calculation set forth in the report.

[3] Both vehicles were registered in Compton's name, but she informed the Government she drove the Mercedes-Benz CLK exclusively and Perez drove the Pontiac Grand Am exclusively. She further explained the Pontiac Grand Am was registered in her name because Perez did not have a valid driver's license and thus could not obtain the required insurance necessary to remove the car from the dealer's lot.

275.6 grams of marijuana, (4) a loaded Rohm .38 caliber revolver with an obliterated serial number, and (5) an unloaded .22 caliber Beretta semiautomatic handgun. The police also seized Perez's Pennsylvania non-drivers license identification card and his passport from the duffel bag containing the contraband. Although both Perez and Compton had access to the vehicle, police investigation revealed none of the items seized from the trunk belonged to Compton.

On August 28, 2003, a four-count indictment issued, charging Perez with one count of possession with the intent to distribute crack in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), one count of possession with the intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(13), one count of possession with the intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(d), and one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). On June 20, 2005, the Court declared a mistrial after the jury could not reach a unanimous verdict. Perez was convicted after a second jury trial on all four counts of the indictment on October 27, 2005. I sentenced Perez on February 17, 2006 to a total term of imprisonment of 252 months to be followed by a five-year term of supervised release.[4]

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[4] To ensure compliance with the statutory minimum and maximum sentences applicable to each count of conviction, I crafted the judgment based on each count. A term of 168 months was imposed on Counts 1 and 2 to be served concurrently. Count 3 resulted in a term of sixty months of

DISCUSSION

In *United States v. Booker*, 524 U.S. 220 (2005), the Supreme Court held the United States Sentencing Guidelines violate the Sixth Amendment. The Court determined a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. As a remedy, the Court severed the statutory provision making the Guidelines mandatory, thereby rendering the Guidelines advisory. *Booker*, 540 U.S. at 245 (excising 18 U.S.C. §§ 3553(b)(1)). In the wake of *Booker*, "district courts, while not bound to apply the guidelines, must consult those guidelines and take them into account when sentencing." *Id.* at 767. The Guidelines, however, do not receive greater weight than the other factors outlined in 18 U.S.C. § 3553(a), which controls sentencing post-*Booker*.

Section 3553(a) sets forth the relevant factors a district court must consider when imposing a reasonable sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). The relevant factors are: (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the need to impose a sentence to reflect the seriousness of the offense, promote respect for the law, afford

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prison time to be served concurrently with Counts 1 and 2. The mandatory minimum of five years, plus an additional two years, applied to Count 4, resulting in a total term of 84 months to be served consecutively to Counts 1 and 2. I imposed five years of supervised release on Counts 1, 2 and 4, and a two-year period of supervised release on Count 3, with all such terms to be served concurrently.

deterrence, protect the public from defendant's further crimes, and provide the defendant with needed educational and vocational training and other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the sentencing ranges recommended by the Guidelines; (5) any pertinent policy statement issued by the United States Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to victims. 18 U.S.C. §§ 3553(a)(1)-(7).

The district court must demonstrate a meaningful consideration of the § 3553(a) factors and set forth the reasons underlying its decision. *United States v. Cooper*, No. 05-1447, slip op. at 12 (3d Cir. Feb. 14, 2006) (precedential opinion). A proper § 3553(a) analysis, however, does not require a sentencing judge discuss each factor, make findings as to each factor, or consider every argument by a litigant if the argument lacks merit. *Id.* The Third Circuit merely requires the "record make[] clear the court took the factors into account in sentencing." *Id.* Additionally, simply because a sentence falls within the Guidelines range does not make the sentence presumptively reasonable. Such a conclusion directly contravenes *Booker* itself, 543 U.S. at 259-260 (explaining the Guidelines are only one factor that controls federal sentencing after excising the mandatory provision), and the Third Circuit admonishes such an approach by federal district judges sitting within the Circuit. *Cooper*, slip op. at

13, 17 (holding "a within guidelines sentence is not necessarily reasonable *per se*). "Otherwise, as several Courts of Appeals have concluded, we would come close to restoring the mandatory nature of the guidelines excised in Booker." *Cooper*, slip op. at 17.

To best fulfill the mandate set by Booker and Third Circuit law explaining *Booker* implications for sentencing, this Court has adopted a three-step procedure to govern federal sentencing.[5] First, I determine the statutory minimum and maximum sentence applicable to each count of conviction. Second, I conduct a step-by-step analysis of the Guidelines to determine the Guidelines range applicable to the case and consider whether the Guidelines or Sentencing Commission policy statements justify any departures from that range. Third, I consider the other sentencing factors set forth in § 3553(a) factors and craft a sentence balancing those factors. This analytical framework was applied to Perez's case, and I will address each step in turn.

The maximum sentence for possession with the intent to distribute crack and cocaine is forty years incarceration, with a minimum term of imprisonment of five years. 21 U.S.C. § 841(b)(1)(B). As Class B felonies, both the crack and cocaine

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[5] Although the Third Circuit does not require such a statement, I routinely begin my sentencing analysis for the record by recognizing *Booker* effectively rendered the Guidelines advisory, but § 3553(a), which now governs sentencing, still requires the Court calculate and consider the applicable Guidelines range.

convictions also mandate a period of supervised release of at least four years but no more than five years, a maximum fine of $2,000,000 and a $100 special assessment. 18 U.S.C. §§ 3013(a)(2), 3559(a), 3571(b), 3583(b)(1); 21 U.S.C. § 841(b)(1)(B). By statute, probation is prohibited. 21 U.S.C. § 841(b)(1)(B). The statutory maximum sentence for possession with the intent to distribute marijuana is five years incarceration, with a required term of supervised release of at least two years. 21 U.S.C. § 841(b)(1)(D); *see also* 18 U.S.C. § 3583(b)(2) (limiting supervised release period to no more than three years for a Class D felony). This offense qualifies as a Class D felony, 18 U.S.C. § 3559(a), for which a maximum fine of $250,000 applies, 18 U.S.C. § 3571(b); 21 U.S.C. § 841(b)(1)(D). A $100 special assessment also is required. 18 U.S.C. § 3013(a)(2). The statutory maximum consecutive sentence for possession of a firearm in furtherance of a drug trafficking offense is life imprisonment,[6] with a minimum term of five years incarceration. 18 U.S.C. § 924(c)(1)(A)(i). As a Class A felony, no more than five years of supervised release and a maximum fine of $250,000 may be imposed. 18 U.S.C. §§ 3559(a),

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[6] Although § 924(c) is silent as to the maximum statutory sentence, courts have read the provision as setting life imprisonment as the maximum. *See United States v. Sandoval*, 241 F.3d 549, 551 (7th Cir. 2001) (holding *Apprendi v. New Jersey*, 530 U.S. 466 (2000), inapplicable to a conviction under § 924(c)(1)(A) because the statute carries a maximum sentence of life imprisonment); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000) (same); *see also Harris v. United States*, 536 U.S. 545, 574 (2002) (Thomas, J., dissenting) (stating the statutory maximum of life imprisonment applies to any violation of § 924(c)(1)(A)).

3571(b), 3583(b)(1). A $100 special assessment must be imposed, 18 U.S.C. § 3013(a)(2), and probation is statutorily prohibited, 18 U.S.C. § 924(c)(1)(D)(i).

I next calculated the Guidelines range applicable to Perez's case utilizing the November 1, 2005 edition of the United States Sentencing Guidelines Manual ("U.S.S.G."). U.S.S.G. § 1 B 1.11(a) (2005) (requiring use of the version in effect on the date of sentencing). First, the three counts of conviction for drug possession were grouped because they involve substantially the same harm (i.e., drug offenses), and the offense level is determined largely on the quantity of substance involved. U.S.S.G. § 3D1.2(d). The firearms conviction was excluded from the grouping and calculation of the Guidelines because 18 U.S.C. § 924(c) mandates consecutive sentences. U.S.S.G. §§ 3D1.1(b)(1), 5G1.2(a).

The base offense level for a violation of 21 U.S.C. § 841(a) is set forth in U.S.S.G. § 2D1.1(a)(3) and the Drug Quantity Table in U.S.S.G. § 2D1.1(c). Where there are multiple drug types, the quantities of the different controlled substances must be combined. U.S.S.G. § 2D1.1 cmt. n.6. To combine different drug types, the Guidelines provide tables from which to convert each drug into its marijuana equivalents. U.S.S.G. § 2D1.1 cmt. n.10. The total of the marijuana equivalent amounts is then used to determine the combined base offense level using the Drug Quantity Table.

In this case, the jury unanimously agreed, by proof beyond a reasonable doubt, the amount of crack was five grams or more. The DEA regional

laboratory examined the crack recovered and advised the net weight was 39.5 grams. The marijuana equivalent of the net weight is 790,000 grams or 790 kilograms. The jury also unanimously agreed, by proof beyond a reasonable doubt, the amount of cocaine was five hundred (500) grams or more. The DEA regional laboratory examined the cocaine recovered and advised the net weight was 990.5 grams. The marijuana equivalent of the net weight is 198,100 grams or 198.1 kilograms. While the jury unanimously agreed, by proof beyond a reasonable doubt, that Perez was guilty of possession with the intent to distribute marijuana, they did not make a finding as to the amount of marijuana. According to the PSIR, the DEA regional laboratory examined the marijuana recovered and advised the net weight was 275.6 grams.[7] The marijuana equivalent of the net weight is 275.6 grams or .2756 kilograms. The combined quantity of drugs is

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[7] A finding of the amount of marijuana by a preponderance of the evidence does not raise the Sixth Amendment concerns addressed in *Booker* because the Guidelines are only advisory in a post-*Booker* sentencing scheme. Booker, 543 U.S. at 259 (holding that, without the mandatory provision, "the statute falls outside the scope of *Apprendi's* requirement" sentence enhancements be based solely on facts rendered by a jury or admitted by the defendant); *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005) (holding "with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection"). Perez also raised no objections, in writing or at the sentencing hearing, to reliance on the DEA laboratory results to determine the marijuana quantity. Even with the marijuana amount excluded Perez would still face a sentence based on a combined drug quantity equivalent to nearly 1,000 kilograms of marijuana.

988,375.6 grams or 988.3756 kilograms of marijuana. A base offense level of 30 applies where the quantity of marijuana is at least 700 kilograms but less than 1,000 kilograms.

Because no enhancements for specific offense characteristics or other adjustments applied in this case, I next determined the criminal history category applicable to Perez. According to the PSIR, Perez has six prior adult criminal convictions, the first five of which occurred in Georgia and the last in Pennsylvania.[8] His first adult conviction occurred on April 3, 1996, when he pled guilty to battery in state court in Atlanta, Georgia. He was sentenced to one year of probation and ordered to pay a $300 fine. Approximately eight months later, he was arrested for a probation violation, resulting in the continuation of the original order of probation. His second criminal conviction occurred on March 16, 1998, when he entered a nolo contendere plea to driving with a suspended or revoked license and was ordered to pay a $128 fine. On December 4, 1998, Perez pled guilty to theft by receiving stolen property and concealing the identity of a motor vehicle. He was sentenced to three years probation on both counts to run concurrently and ordered to pay a $500 fine. Perez pled guilty to conducting a

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[8] The Presentence Investigation Report identified one juvenile conviction for driving with a suspended license for which Perez pled nolo contendere. He received a sentence of twelve months confinement, which was suspended after serving only two days, and ordered to a pay a fine and court fees. No criminal history points applied to this offense because the sentence imposed did not meet the criteria set forth in § 4A1.2(d).

financial transaction with a stolen credit card in November, 1998. Again, the Georgia state court imposed a sentence of two years probation. His fifth conviction occurred in December, 2002 when he pled guilty to reckless conduct, received a twelve-month probation sentence and was ordered to pay a $1,000 fine. His last conviction occurred on September 3, 2003, when he entered a guilty plea on charges of carrying a firearm without a license and on public streets or places. The Philadelphia County Court of Common Pleas sentenced him to not less than six months but no more than twenty-three months imprisonment with credit for time served, three years probation, and to pay court costs.[9]

One criminal history point applies to each prior conviction for which a term of probation of at least one year or a term of imprisonment of at least thirty days was imposed. U.S.S.G. § 4A 1.2(c)(1). Accordingly, his five convictions in Georgia resulted in four criminal history points. Three criminal history points apply to Perez's Pennsylvania conviction because the sentence of imprisonment exceeded one year and one month. U.S.S.G. § 4A1.1(a). The Guidelines require two additional criminal history points apply when the defendant commits the instant offense while under any criminal justice sentence, including probation. This provision applied to Perez's case because, at the time of the instant offense, he was on probation for the reckless conduct conviction. Perez's criminal history resulted in a total of nine criminal history points,

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[9] Perez was granted parole on June 8, 2004.

which placed him in a criminal history category of IV.

Based on the total offense level of 30 and a criminal history category of IV, the advisory Guidelines range for Perez was 135 months to 168 months imprisonment. The firearm conviction, pursuant to 18 U.S.C. § 924(c)(1), required a five-year mandatory minimum term of imprisonment (sixty months) to run consecutively.[10]

The Guidelines also place limits on other non-incarceration types of sentences in Perez's case. Specifically, I found the authorized term for supervised release was at least three years but not more than five years for a Class B felony (i.e., the cocaine and crack convictions), and at least two years but not more than three years for a Class D felony (i.e., the marijuana conviction). U.S.S.G. § 5D1.2(a)(1), (2). Supervised release is required if the Court imposes a term of imprisonment of more than one year or when required by statute. U.S.S.G. § 5D1.1. Perez also was ineligible for probation because his drug convictions are Class B felonies, 18 U.S.C. § 841(b)(1)(B) precludes probation, and the minimum Guidelines range of 135 months placed him in Zone D of the Sentencing Table. U.S.S.G. § 5B1.1(b)(1)-(2), cmt. n.2. The fine range for the

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[10] At the sentencing hearing, I noted for the record a sixty-month minimum for the firearm charge if applied to the Guidelines range would raise the low-end of the Guidelines range to 195 months and the minimum for the high-end of the Guidelines range to 228 months. This Court understands, however, the advisory Guidelines calculation cannot include the mandatory consecutive sentence for the firearms charge.

instant offenses was from $17,500 to $4,00,000, U.S.S.G. §§ 2K2.4 cmt. n.7, 5E1.2(c)(3)-(4), and restitution was not an issue because there was no financial loss to a victim, U.S.S.G. § 5E1.1(a).

Neither the Government nor Perez requested a departure and the Court did not find a basis for a departure. Therefore, I next turned to the third step in the sentencing framework to balance the factors set forth in 18 U.S.C. § 3553(a) to yield a reasonable sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a).[11] The instant offense involved the possession of over 1,000 grams of three different controlled substances, which is not a small indiscretion in the eyes of the law. This heavy trafficking quantity of drugs did not, but could have, ended up in the community if not for the intervention, albeit incidental, of the Philadelphia police. The presence of weapons further endangered society because of the violence potential generally associated with gun possession. I specially noted multiple weapons were found and attributed to Perez - an unloaded weapon and a loaded weapon with an obliterated serial number - despite indictment for only one count of a § 924 violation. The Guidelines calculation did not permit a method by which to account for the possession of multiple guns and the obliteration of the serial number on one of the guns. The statutorily mandated consecutive sentence for the § 924(c) conviction adequately addressed the possession of the weapons in furtherance of a drug trafficking crime, but a

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reasonable sentence needed to reflect these two additional aggravating factors. I found a sentence of eighty-five months - two years more than the statutory minimum - sufficiently achieved this purpose.

The record before the Court also contained significant, negative evidence about the defendant's character and gave no indication he was ready to renounce his criminal activity and conform his behavior to societal norms and expectations. At the age of twenty-eight years, Perez has a long history of committing criminal offenses since he was juvenile. The instant offense was his seventh conviction in two states. Despite multiple probationary and monetary sentences from the Georgia state courts, Perez continued his illegal behavior but changed the community subject to his illegal conduct. In 2002, at the age of twenty-four years, he was arrested for the first time in Philadelphia, and after years of trouble with the law was sentenced to prison time but not a lengthy period. The discipline of a corrective institution for a significant period of time is necessary given the ineffectiveness of Perez's prior sentences and his apparent inclination against conforming his behavior to the law.

A substantial sentence is further justified in Perez's case based on the timing of his current offenses. The police located the drugs and weapons in the trunk of the car in April, 2003. This was after Mr. Perez was arrested for firearm possession and while he was awaiting trial on this charge in Philadelphia state court. A fair reading of Perez's

criminal history establishes he continued to engage in illegal conduct, both drug trafficking and weapons possession, despite pending criminal prosecution for weapon charges. Perez also has pending charges on two Philadelphia County criminal complaints for various violent crimes, including aggravated assault, attempted murder, firearms possession, reckless endangerment, and criminal conspiracy. Although these charges could not be considered in the calculation of the sentencing Guidelines, these charges, along with his prior convictions and current offenses, evidence a pattern of violence and gun possession that raises significant concern of recidivism and for the public's safety.

A substantial term of imprisonment sufficiently would deter Perez from any future criminal conduct, protect the public, and act as a general deterrent on others engaged in similar illegal behavior. A lengthy sentence also is essential to promote respect for the law generally, but more importantly to ensure Perez understands his need to respect the law. A sentence of twenty-one years - 168 months for the crack and cocaine convictions (the high end of the Guidelines range), a concurrent sentence of sixty months on the marijuana conviction (the maximum term permitted by statute), and a consecutive sentence of 84 months for the weapons charge - reasonably and sufficiently addresses these sentencing concerns.

After a thorough review of Perez's personal history, I find nothing remarkable about his history to support a lower sentence. He reportedly had a

good home life as a child despite his parents divorcing when he was twelve years old. His father's former position as a police officer in Dade County, Florida did not have a positive impact on Perez given his early start into the criminal life. Perez has never been married, has no children, and his last girlfriend testified against him at trial. He has no significant medical history or history of ongoing medical problems to factor into a reasonable sentence. Perez may have some minimum rehabilitation needs, but none so significant to justify a lighter sentence. Specifically, while he has no significant history of substance abuse or mental health problems, according to the PSIR, he informed Philadelphia County Adult Probation and Parole Office he occasionally used marijuana. No evidence indicates this use, however, rises to the level where he requires treatment. Perez also reportedly never finished high school but received his GED, although that fact could not be verified by the probation office. He has held jobs in the past as a valet, promoter and manager of a club, but those positions did not provide a strong incentive for him to refrain from engaging in criminal behavior. He certainly could benefit from vocational training to permit him the greatest chance for success upon completion of the sentence I imposed, but I find the Bureau of Prisons is best suited to help Mr. Perez with these few rehabilitation efforts while simultaneously keeping a careful watch on him until he is 49 years old.

Perez raised one sentencing argument concerning disparity and asked the Court to grant credit for time served and to place him at a federal

institution in a specific region of the country. I find the disparity issue lacks merit and his requests fall outside my judicial power.

First, defense counsel contends the sentencing differential between crack cocaine and powder cocaine, commonly referred to as the 100-to-1 ratio, creates negatively and unfairly skewed sentences when crack is involved.[12] It is undisputed the Guidelines treat possession of five grams of crack the same as they treat possession of 500 grams of powder cocaine. As a result, it takes 100 times more cocaine powder as crack to trigger the same penalties.[13] In the past ten years, the Sentencing Commission has made three unsuccessful attempts to have Congress modify the 100-to-1 ratio.[14]

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[12] Although *Cooper* makes clear a district court need not address meritless sentencing arguments, the crack cocaine and powder cocaine disparity is an issue of first impression in the Third Circuit. Careful consideration therefore is warranted.

[13] The Anti-Drug Abuse Act of 1985 created the mandatory minimum penalty scheme applicable to drug trafficking violations, including cocaine offenses, and first introduced the 100-to1 ratio. Pub. L. No. 99-570, 100 Stat. 3207 (1986). The Act set a ten-year mandatory minimum for five grams of crack, but required 100 times greater quantity of cocaine powder for the same penalty. See 21 U.S.C. § 841(b). The Sentencing Commission extended the sentencing disparity to the Guidelines in 1987 by setting the same base offense level for five grams of crack and 500 grams of cocaine powder. *United States v. Smith*, 359 F. Supp. 2d 771, 778-79 (E.D. Wis. 2005).

[14] In light of concerns about the 100-to-1 ratio, namely that "crack cocaine and powder cocaine are two forms of the same drug and African-Americans tended to be prosecuted more frequently than whites for crack-crime," *United States v. Tabor*, 365 F. Supp. 2d 1052, 1057, Congress directed the Sentencing Commission examine the issue. Violent Crime

Despite congressional reluctance to adopt a less severe ratio, post-Booker district courts have acknowledged the disparity between sentences imposed for equivalent amounts of crack versus powder cocaine and accepted this argument to impose a non-Guidelines sentence. *See, e.g., United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005) (altering Guidelines range consistent with 20-to-1 ratio); *United States v. Leroy*, 373 F. Supp. 2d 887, 897 (E.D. Wis. 2005) (same); *United States v. Beamon*, 373 F. Supp. 2d 878, 887 (E.D. Wis. 2005) (same); *Simon v. United States*, 361 F. Supp. 2d 35, 48-49 (E.D.N.Y. 2005) (same result with 20-to-1 or 10-to-1 ratio); *United States v. Smith*, 359 F. Supp.

Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 297 (1994). In 1995, the Commission unanimously rejected the 100-to-1 ratio as unjustifiable, and by a 4-to-3 vote, offered a proposed amendment to the Guidelines enacting a 1-to-1 ratio. Congress rejected the proposal, but directed the Commission to present other recommendations. *United States v. Perry*, 389 F. Supp. 2d 278, 301 (D.R.I.2005). In 1997, the Commission offered a 5-to-1 ratio on which Congress took no action. *Id.* In 2002, the Commission offered a new report reiterating its concerns the 100to-1 ratio lacked reliable penological or scientific justification and urging Congress to adopt a less severe ratio of 20-to-1. The findings from the 2002 report commonly cited to support a lower ratio include: (1) crack cocaine tends to involve low-level offenders (i.e., those with the lowest quantity of drugs and the least criminal history); (2) minorities are disproportionately persecuted for a crack offense; (3) no substantial difference exists between the prevalence of aggravated conduct in crack cases relative to cocaine powder cases; and (4) no pharmacological difference exists between the two types of cocaine. *Id.; Smith*, 359 F. Supp. 2d at 778-80. Despite these findings, Congress has yet to act on the Commission's most recent proposal.

2d 771, 782 (E.D. Wis. 2005) (same). *But see United States v. Tabor*, 365 F. Supp. 2d 1052, 1061 (D. Neb. 2005) (finding only Congress can alter crack-to-powder cocaine ratio).

These cases reject the 100-to-1 ratio without considering how the disparity fairs in light of the defendant's individual characteristics. For instance, in *Perry*, the district court expressly found the disparity was "the core of all of the issues involved in the sentencing" and nearly halved the low end of the advisory Guidelines range based solely on a 20-to-1 ratio. Even in cases where the courts consider other sentencing factors, the sentencing disparity controlled over mixed or negative evidence balancing against a substantial alteration in the advisory Guidelines range. *See, e.g., Leroy*, 373 F. Supp. 2d at 890-91 (altering advisory Guidelines range despite the defendant posing a danger risk to the public, a serious criminal history, unstable employment history, and prior drug problem); *Beamon*, 373 F. Supp. 2d at 886-87 (applying 20-to-1 ratio, despite "a somewhat mixed picture" of defendant's characteristics, risk of recidivism, and other § 3553(a)(2) concerns, partially because the sentencing judge had used that ratio previously).

This Court's interpretation of the post-*Booker* district court opinions is consistent with the only published Circuit Court decision addressing impact of the crack and powder cocaine disparity on post-*Booker* sentencing. In *United States v. Pho*, 433 F.3d 53, 64 (1st Cir. 2006), which involved two companion cases, the First Circuit rejected the lower court's

alteration of the 100-to-1 ratio partially because, "although the district court considered individualized factors in each case, it did not base its sentencing decisions on those factors.... [T]he 'only thing' that supported reduced sentences for the defendants was the 'tragic' and 'incongruous' treatment of crack cocaine offenses in the sentencing guidelines and the underlying statutory scheme." This categorical rejection, according to the *Pho* court, amounted to an error of law because "sentencing decisions must be done case by case and must be grounded in case-specific considerations, not in general disagreement with broad-based policies enunciated by Congress or the Commission, as its agent." *Id.* at 65.

While I find this aspect of the *Pho* decision persuasive, the decision creates tension with the § 3553(a)(6) factor by initially holding a district court can never consider a crack-powder cocaine ratio other than the 100-to-1 ratio because only Congress can choose a different ratio. A sentencing judge cannot completely ignore the 100-to-1 ratio because the advisory Guidelines range, which remains relevant under a § 3553(a) analysis, and the statutory minimum and mandatory sentences reflect Congress' preferred ratio. And while uniformity is certainly threatened by courts considering various crack-powder cocaine ratios, some level of non-uniformity is bound to arise when a judge has discretion in sentencing.

Whether this Court finds the crack and powder cocaine disparity sufficient to justify

applying a different ratio in sentencing, however, need not be decided to determine Perez's sentence. Even if I assume § 3553(a)(6) permits me to consider the crack-cocaine powder disparity, the language of the sentencing factor is clear: the examination of an unwarranted disparity cannot be done in a vacuum. Rather, the statute states a reasonable sentence should consider "the need to avoid *unwarranted* sentence disparities *among defendants with similar records who have been found guilty of similar conduct*." 18 U.S.C. § 3553(a)(6) (emphasis added). A court must consider each offender and each offense individually to determine if the disparity amounts to an unwarranted one when crafting a reasonable sentence. For instance, in *United States v. Fisher*, the sentencing judge expressly found the difference between the advisory Guidelines range based on crack cocaine and a sentence treating the same drug as powder cocaine was fourteen years at the low end of the range. No. 03-cr-1501, 2005 U.S. Dist. LEXIS 23184, at *34 (S.D.N.Y. 2005) (finding Guidelines range based on crack with low end of 235 months, whereas treating the crack as powder cocaine corresponded to 63 to 78 months). In that instance, the length of the disparity could not be so easily overlooked by the court and, in crafting a reasonable sentence in light of all the 3553(a) factors, the court applied a lower ratio to reflect the unwarranted disparity. *Id.* at *34-35.

This Court does not find an unwarranted disparity exists in Perez's case sufficient to justify a lower sentence. First, this is not a case of a small-time drug dealer arrested only for crack cocaine.

Perez is an admitted drug trafficker. According to the PSIR, after his arrest on the instant offenses, Perez made a proffer during which he declared he was a drug trafficker who received ten to twenty kilograms of cocaine per week, for approximately a six-month period. That means, Perez, by his own admission, caused nearly 500 kilograms of cocaine to enter the community or created an opportunity for the drugs to enter the community. Nor is Mr. Perez a discriminating drug trafficker - he was arrested and found guilty by a jury for the possession of three different controlled substances.

Second, the length of disparity courts have found troublesome does not exist in Perez's case. No ten- or fourteen-year sentence difference arises largely because this case does not solely involve crack cocaine. Under a 20-to-1 ratio, which most district courts utilize, the difference in the resulting Guidelines range is minor because Perez was convicted of possession of 990.5 grains of cocaine. If you treat the crack cocaine amount with the altered ratio and merely add that amount to the 990.5 grams, the resulting 142.44 kilograms of cocaine converts to 356.1 kilograms of marijuana. At best, the disparity equates to a four-level drop in the offense level to 26, and the resulting three- to four-year difference in sentencing is insubstantial relative to those variances other courts have found troubling. All the evidence in this case points to the advisory Guidelines range resulting in 135 months to 168 months because of Perez's conduct, not a disparity - Perez chose to be a drug trafficker, he chose to possess a significant amount of multiple

controlled substances, he was found guilty by a jury of possessing all three drugs, and together those amounts led to his Guidelines sentence. I find the sentence I imposed, utilizing the advisory Guidelines range reflecting the 100-to-1 ratio, does not differ substantially from a sentence calculated with a lower ratio of crack cocaine to powder cocaine as to amount to an unwarranted disparity.

Perez also requested that any sentence imposed include credit for time he served while incarcerated on his state charge because he could not execute on the bail granted due to a detainer on the federal charges. Defense counsel cited U.S.S.G. § 5G1.3 as a source for this Court's authority to give credit for time served. This provision, however, grants the Court authority only to impose a federal sentence to run concurrently, partially concurrently, or consecutively to an undischarged term of imprisonment. It does not relate to the granting of credit for time served. Rather, 18 U.S.C. § 3585(b) governs this issue and extends to an offender the right to have certain jail-time credit. But according to the Supreme Court in *United States v. Wilson*, 503 U.S. 329 (1992), the duty to compute and ultimately grant the time served rests with the Attorney General, through the Bureau of Prisons. Therefore, I have no authority to grant or calculate any credit for time served when determining Perez's sentence, and any arguments as to this point must be directed to the Bureau of Prisons.

Perez's second request was placement at an institution in the Northeast region of the United

States. Again, the Bureau of Prisons, not the court, has the power to designate the place of a defendant's imprisonment. 18 U.S.C. § 3621(b). Therefore, I offered the Defendant's request as a recommendation, but recognized the final decision rested with the Bureau of Prisons.

For all these reasons, and for the reasons stated on the record at the sentencing hearing, a sentence of a total of 252 months imprisonment is just and meets the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a).

BY THE COURT

/s/ Juan R. Sanchez, J.
Juan R. Sanchez, J.